

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
ROBERT V. JUNGARO and
ESKIL JUNGARO,

Appellants,

v.

PUGET SOUND AIR POLLUTION
CONTROL AGENCY,

Respondent.

PCHB No. 77-168

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal of five \$250 civil penalties for outdoor burning allegedly in violation of respondent's Regulation I, came on for hearing before the Pollution Control Hearings Board, Dave J. Mooney, Chairman, and Chris Smith, Member, convened at Seattle, Washington on March 27, 1978. Hearing examiner William A. Harrison presided. Respondent elected a formal hearing pursuant to RCW 43.21B.230.

Appellants both appeared, pro se. Respondent appeared by and through its attorney, Keith D. McGoffin. Olympia court reporter Christina M. Check recorded the proceedings.

1 Respondent, Puget Sound Air Pollution Control Agency (PSAPCA),
2 has moved to dismiss this appeal on grounds that the Notice of Appeal
3 was not filed with the Hearings Board and respondent within thirty
4 days from the date that the appealed orders were communicated to
5 appellants. RCW 43.21B.230 and WAC 371-08-080.

6 From affidavits and argument of the parties we find that:

7 1. Shortly after the alleged violations of October 12 and 14, 1977,
8 appellant, Robert Jungaro, received five numbered "Notices of Violation,"
9 one of which was Number 14793.

10 2. On October 20, 1977, respondent, PSAPCA, wrote a letter cancelling
11 14793 and replacing it with Number 14794, attached to the letter. That
12 letter was sent certified mail, return receipt requested, to appellant,
13 Robert Jungaro. The letter was returned to the post office;

14 respondent did not prove that appellant was aware of its attempted deliver

15 3. On October 28, 1977, respondent, PSAPCA, made personal service
16 of five "Notices and Order of Civil Penalties" upon both appellants.
17 Each of these referenced a "Notice of Violation," but Number 14793 was
18 not referred to, rather reference was made to Number 14794.

19 4. On November 17, 1977, respondent, PSAPCA, made personal service
20 of "Notice of Violation" Number 14794 upon appellant, Robert Jungaro.

21 5. On November 29, 1977, appellants' Notice of Appeal was received
22 by this Hearings Board and respondent, PSAPCA.

23 In view of the replacement Notice of Violation No. 14794, which had
24 the effect of confusing the appellant as to the length of time within
25 which to file an appeal, respondent's motion to dismiss this appeal is
26 denied.

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1 The Hearings Board conducted a hearing on the merits. Witnesses
2 were sworn and testified. Exhibits were examined. Having heard the
3 testimony and examined the exhibits, and being fully advised, the
4 Pollution Control Hearings Board makes these

5 FINDINGS OF FACT

6 I

7 Respondent, pursuant to RCW 43.21B.260, has filed with this
8 Hearings Board a certified copy of its Regulation 1 containing
9 respondent's regulations and amendments thereto of which official notice
10 is taken.

11 II

12 Appellant, Robert Jungaro, owns land at 1501 Mukilteo Lane, Mukilteo,
1 Washington, and did so at all times relevant to this appeal. His home is
14 on that land, and he plans to clear a portion of it to pasture horses there.
15 The land is within the "urbanized area" as defined by the United States
16 Bureau of the Census.

17 III

18 In September, 1977, Robert Jungaro went to the City Clerk of Mukilteo
19 and said that he proposed to burn some small alders not more than three
20 inches thick. He was issued a burning permit (Exhibit R-2) but failed
21 to make use of it before it expired. Thereafter, he arranged for his
22 land to be cleared by bulldozer which resulted in a pile of stumps,
23 limbs, branches and dirt 50 feet long, 25 feet wide and 15 feet high.
24 Next, he again sought a city burning permit for the purpose of burning
25 the pile just described. Because he did not disclose the magnitude of
the material to be burned, the City Clerk issued a permit which was

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1 suitable for the small fire which was mentioned in obtaining the earlier
2 permit, now expired. This second permit, however, unlike the first,
3 expressly and on its face authorized the burning of a "pile no more than
4 (4) feet in diameter and three (3) feet in height." (Exhibit R-1).
5 Without reading or heeding this limitation, appellant, Robert Jungaro,
6 called on his father, Eskil Jungaro, also an appellant herein, and they
7 cooperatively ignited the 50'x25'x15' pile that had resulted from the
8 land clearing project.

9 IV

10 A day or two later, on October 12, 1977, the black smoke arising from
11 appellants' outdoor burning attracted the attention of the Mukilteo Police
12 Chief. After making an inspection of the fire, the Chief summoned the Fire
13 Marshal and an inspector for respondent, PSAPCA. The stump-pile
14 was not entirely afire but was burning at several points along its
15 length. Within the burning portions there were several automobile tires
16 and metal objects including tin cans and the remnants of broken lawn
17 furniture. Appellants caused emissions aggregating at least ten
18 consecutive minutes, and of an opacity of 60 percent during a period of
19 observation by respondent's air pollution inspector. Appellant, Robert
20 Jungaro, was told to extinguish the fire by the Fire Marshal who
21 cancelled the City burning permit. The fire continued to burn, however,
22 until the following day, October 13, 1977.

23 V

24 On October 14, 1977, appellant, Eskil Jungaro, unaware of the
25 events of the previous two days, returned to the scene of the burning
26 and re-ignited the fire in keeping with his son's earlier bidding that

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1 he help in carrying out the burning. Eskil Jungaro believed that his son
2 had obtained the permission necessary to burn legally and the son,
3 Robert, did not notify him otherwise.

4 Again black smoke was emitted, as Eskil Jungaro burned tar paper and
5 other debris which he brought from a construction site and used as kindling
6 to ignite the stump-pile. The fire was finally and thoroughly
7 extinguished by the Mukilteo Fire Department after inspections by
8 Mukilteo police and fire personnel and respondent's air pollution
9 inspector.

10 VI

11 Shortly after the burning on October 12 and 14, 1977, appellant,
12 Robert Jungaro received Notices of Violation citing five violations of
13 respondent's regulations. On October 28, 1977, respondent made
14 personal service of five "Notices and Orders of Civil Penalty" upon
15 both Robert and Eskil Jungaro. These cited violation of Regulation I,
16 Section 8.06(3), Section 8.02(3) and Section 9.03(b) on October 12, 1977
17 and assessed a civil penalty of \$250 for each violation. Further
18 violations of Section 8.06(3) and 8.02(3) were cited regarding the
19 burning on October 14, 1977 and a \$250 civil penalty was assessed for
20 each of these violations. The five civil penalties aggregate \$1,250.
21 From these appellants appeal.

22 VII

23 Any Conclusion of Law which should be deemed a Finding of Fact is
24 hereby adopted as such.

25 From these Findings, the Pollution Control Hearings Board comes
to these

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CONCLUSIONS OF LAW

I

In 1972, the State Legislature enacted the following policy into law:

It is the policy of the state to achieve and maintain high levels of air quality and to this end to minimize to the greatest extent possible the burning of outdoor fires. Consistent with this policy, the legislature declares that such fires should be allowed only on a limited basis under strict regulation and close control. RCW 70.94.740.

Regional air pollution control authorities, such as respondent, PSAPCA, were delegated the task of implementing this policy by regulations. RCW 70.94.755.

II

Regarding any outdoor fire for land clearing burning, Section 8.06 of respondent's Regulation I declares:

It shall be unlawful for any person to cause or allow any outdoor fire for land clearing burning:

(1) In an area with a general population density of 2,500 or more persons per square mile;

(2) Within 100 feet of any structure other than that located on the property on which the burning is conducted;

(3) Within the urbanized area as defined by the United States Bureau of the Census unless the Agency has verified that the average population density on the land within 0.6 miles of the proposed burning site is 2,500 persons per square mile or less.

Appellants violated Section 8.06(3) in burning for land clearing within the urbanized zone without first obtaining a verification of population density from respondent, PSAPCA. Each day's burning, on October 12 and again on October 14, constitutes a separate violation of that regulation. Section 3.29 and RCW 70.94.431. The permit issued by the City of Mukilteo for burning a 4 foot by 3 foot pile of natural vegetation ne

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1 at any time, provided authority for the burning conducted by appellants.
2 Appellants proceeded at their own risk in igniting their land clearing
3 fire without reading that City permit.

4 III

5 Section 8.02(3) of respondent's Regulation provides:

6 It shall be unlawful for any person to cause or allow
7 any outdoor fire:

8 (3) containing garbage, dead animals, asphalt, petroleum
9 products, paints, rubber products, plastics or any substance
10 other than natural vegetation which normally emits dense smoke
or obnoxious odors; or

11 Appellants violated Section 8.02(3) by causing or allowing outdoor fires
12 containing tires, lawn chairs and construction site debris such as tar
13 paper. Each day's burning, on October 12 and 14, constitutes a separate
14 violation of that regulation. Section 3.29 and RCW 70.94.431.

15 IV

16 In emitting an air contaminant, smoke, for more than three minutes
17 in any one hour, which contaminant is of an opacity obscuring an
18 observer's view to a degree equal to or greater than does smoke
19 designated as No. 1 on the Ringelmann Chart, appellants violated
20 Section 9.03(b) of respondent's Regulation I on October 12, 1977.

21 V

22 Both appellants personally caused the violations of October 12, 1977.
23 Although appellant Eskill Jungaro, alone, personally caused the violations
24 of October 14, 1977, appellant, Robert Jungaro, is also liable for those
25 violations under the doctrine of respondeat superior. This is so because
26 Robert Jungaro requested and enlisted the assistance of his father,

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1 Eskil Jungaro, in starting the land clearing fire on Robert's property.
2 That request was unrevoked and Eskil Jungaro was acting within the
3 scope of it when, on October 14, 1977, he ignited the fire which gave
4 rise to the violations.

5 Both appellants, Robert and Eskil Jungaro, are therefore liable to
6 respondent for all civil penalties properly assessed for the violations
7 of October 12 and 14, 1977.

8 VI

9 Appellants' violations arise from their apparent assumption that
10 outdoor burning is an unrestricted right. In fact, it is strictly
11 regulated in keeping with the policy enacted by the Legislature and set
12 forth above in Conclusion of Law I. While burning for land clearing is
13 not absolutely prohibited, each citizen must distinguish between burning
14 that is allowed and burning that is not.

15 The quantity of air pollution emitted by appellants was not so
16 great as to justify the maximum civil penalty for each violation, without
17 mitigation. It is furthermore possible, on the evidence before us, that
18 had appellants made application to respondent, PSAPCA, the population
19 density in the vicinity of the burning might have been such as to allow
20 respondent to approve the controlled land clearing burning prescribed
21 by Section 3.06. For these reasons, the \$250 maximum civil penalty for
22 each violation should be affirmed but suspended in part.

23 VII

24 Any Finding of Fact which should be deemed a Conclusion of Law is
25 hereby adopted as such.

26 From these Conclusions, the Board enters this

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ORDER

The violations and civil penalties imposed by Notices and Orders of Civil Penalties Nos. 3555, 3556, 3557, 3558 and 3559 are each hereby affirmed as to Robert and Eskill Jungaro; provided, however, that \$190 of each \$250 civil penalty assessed is suspended on condition that neither appellant violate respondent's regulations for a period of one year from the date of appellants' receipt of this Order.

DATED this 10th day of April, 1978.

POLLUTION CONTROL HEARINGS BOARD


DAVE S. MOONEY, Chairman


CHRIS SMITH, Member

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